United Nations CCPR/C/110/D/1900/2009

International Covenant on Civil and Political Rights

Distr.: General
28 May 2014
English
Original: French

Human Rights Committee

Communication No. 1900/2009

Views adopted by the Committee at its 110th session (10 to 28 March 2014)

Submitted by:	Fatima Mehalli (represented by counsel, the Collectif des familles de disparu(e)s en Algérie)
Alleged victims:	Mohamed Mehalli (disappeared), his wife, Fatma Mehalli, and their children: Bedrane Mehalli; Abderrahmane Mehalli; Soumia Mehalli; Razika Mehalli; and Atik Mehalli (deceased); and the author herself
State party:	Algeria
Date of communication:	26 June 2009 (initial submission)
Document references:	Special Rapporteur's decision under rules 92 and 97, transmitted to the State party on 6 August 2009 (not issued in document form)
Date of adoption of Views:	21 March 2014
Subject matter:	Enforced disappearance
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Right to life, prohibition of torture and cruel or inhuman treatment, right to liberty and security of persons, respect for the inherent dignity of the human person, recognition as a person before the law, and right to an effective remedy
Articles of the Covenant:	Articles 2 (para. 3), 6, 7, 9, 10 (para. 1) and 16
Article of the Optional Protocol:	Article 5 (para. 2 (b))

GE.14-03864 (E) 160614 170614

1403864

Please recycle

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (110th session)

concerning

Communication No. 1900/2009*

Submitted by:	Fatima Mehalli (represented by counsel, the Collectif des familles de disparu(e)s en Algérie)
Alleged victims:	Mohamed Mehalli (disappeared), his wife, Fatma Mehalli, and their children: Bedrane Mehalli; Abderrahmane Mehalli; Soumia Mehalli; Razika Mehalli; and Atik Mehalli (deceased); and the author herself
State party:	Algeria
Date of communication:	26 June 2009 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 March 2014,

Having concluded its consideration of communication No. 1900/2009 submitted to the Human Rights Committee by Fatima Mehalli under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

---

* The following members of the Working Group participated in the examination of the communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Víctor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu.

Pursuant to rule 90 of the Committee's rules of procedure, Mr. Lazhari Bouzid did not take part in the examination of the communication.

The text of a joint opinion by Mr. Salvioli and Mr. Rodríguez Rescia (concurring) is appended to the present Views.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Fatima Mehalli, born in 1969 and of Algerian nationality, who is acting on behalf of her father, Mohamed Mehalli (disappeared), born in 1935, her mother, Fatma Mehalli, born in 1939, the wife of the disappeared person, and their children (the author's brothers and sisters): Bedrane Mehalli, born in 1971; Abderrahmane Mehalli, born in 1977; Soumia Mehalli, born in 1964; Razika Mehalli, born in 1974; and Atik Mehalli (deceased), born in 1978; all of Algerian nationality, and on her own behalf. She argues that her father and the members of her family are victims of various violations by the State party under articles 2 (para. 3), 6, 7, 9, 10 and 16 of the International Covenant on Civil and Political Rights. She is represented by the Collectif des familles de disparu(e)s en Algérie.[1]

1.2 On 19 October 2009, the Committee, through its Special Rapporteur on New Communications and Interim Measures, decided not to consider the admissibility and the merits of the case separately.

The facts as submitted by the author

2.1 The families of brothers Cherif and Mohamed Mehalli lived in the same house, which they had inherited from their parents. Cherif was registrar at the Tribunal of Hussein Dey. In 1992, members of the Islamic Salvation Front threatened him with death if he did not leave his job; he went on sick leave. One night, several uniformed police officers raided the family home, arrested him and detained him for 8 days in Hussein Dey police station, where he was violently tortured. Two months later, after the police had once again come looking for him at his home, Cherif told his relatives that he was leaving. From that time onwards, the house and indeed the whole neighbourhood was put under surveillance and the family was regularly threatened by the police.

2.2 As Cherif did not return, the police went after his nephew, Bedrane (brother of the author), whom they arrested and detained for 2 days at Leveilley police station for the first time in 1993. Arrested again three months later, he was violently tortured at Hussein Dey police station: he was kept sitting on a chair, handcuffed, with his hands behind his back, for four days in a row, while the police officers beat him regularly. He did not eat or drink for more than eight days. When his father went to the police station to visit him, the officers confirmed that they were holding Bedrane and said that he would be released only if his uncle Cherif gave himself up; he was eventually released, but was harassed, beaten and arrested again on numerous occasions. After that, the police wanted him to act as an informer, but Bedrane fled to stay with relatives outside of Algiers for a while before returning to the family home, as the people he was staying with feared reprisals. Meanwhile, the family was subjected to constant harassment by the police, who carried out regular searches and vandalized the family home, under the pretext of looking for Cherif. Tired of this harassment and after receiving threatening letters from the (clandestine) Organisation des jeunes Algériens libres (Organization of Young Free Algerians) (stating that Cherif was a terrorist and that they were going to attack his property and his relatives), Bedrane left the family home and never returned. His relatives think that he joined the maquis.

2.3 The police then picked on Atik, another of the author's brothers, born in 1978. One day, on his way to school, he was going past a police control post when he was recognized by the police, who hit him. On 15 July 1996, during a police raid in the locality led by an officer named Saad, Atik tried to follow the young people running away from the police.

[1] The Optional Protocol entered into force for the State party on 12 December 1989.

Because of a disability resulting from a fall, he held his right hip as he was running. The police thought that he was hiding a weapon, and shot him repeatedly; he died on the spot. The family went to the police station to find out what had happened, and met with police officer Saad, who told them he had sworn to clean up the neighbourhood and destroy any family who had a relative who was a terrorist. The family had great difficulty in recovering Atik's remains, finally managing 12 days after he was killed, having waited each day in front of a cemetery in Algiers.

2.4 The author's father, Mohamed Mehalli, (brother of Cherif, and father of Bedrane and Atik) was arrested for the first time in 1995, after being summoned to Leveilley police station and imprisoned in El Harrach prison. Tried on 1 January 1997, he was sentenced to 1 year in prison for belonging to a terrorist group and for not reporting a killer. As he had already spent 14 months in pretrial detention, he was released on 2 January 1997.

2.5 A week after his release, police officer Saad again came to his home to arrest him. At the house, he found the author, who told him that her father was absent, whereupon the officer struck and insulted her. He waited until the author's father came home and took him away before then releasing him. This was repeated approximately every two weeks, and every time he was arrested, the author's father was beaten. Early in the morning of 14 September 1997, police officers came back to the house and told Mohamed to come out; once outside, he was forced to the ground and beaten for about 10 minutes. On 18 September 1997, police officers led by Saad came back and took Mohamed to a nearby building site. He was pushed to the ground and beaten; his beard was burned and a heavy stone was put on his chest. He had to be treated by a doctor.

2.6 To flee the harassment, he rented a house in another neighbourhood and the family lived there for nearly a year, until 29 June 1998, when Mohamed was arrested in his car by military security officers, in the presence of witnesses. Meanwhile, soldiers and plainclothes police officers raided the family home. The next day, the author and her mother, worried because Mohamed had not come home, went to the police station, but to no avail. When they returned home, military security officers were waiting for them, and the author, her sister Soumia and their mother Fatma were blindfolded and taken in a van to Chateauneuf barracks, infamous for torture and incommunicado detention.

2.7 Once in the barracks, the three women were held separately in different cells. The author was interrogated and then beaten, in order, she believes, for her father, who was also being held there, to hear. She herself could hear her father being tortured. Her sister Soumia was made to lie on a cement table and then tied down with cables connected to a battery which gave her electric shocks. She then suffered torture with a cloth, which prevented her from breathing, before being raped with a stick. The three women were held for 8 days and then taken back to their home. Just before they were released, the author saw her father from the window of her cell. He was being dragged by guards because he had difficulty walking. The family has not had any news of him since that day.

2.8 The police then moved onto Abderrahmane, the author's other brother. He was first arrested in 1993 during a police raid after an attack in the neighbourhood. He was held in Leveilley police station for 3 days and then released after questioning. He was arrested again in 1996 and detained at the same police station for 15 days. The police questioned him about his brother Bedrane and his uncle Cherif. He was arrested again a few months later, and held for 27 days. In March 1997, he was arrested and held for 15 days in detention at Leveilley police station before being taken to El Harrach prison. On 29 March 1997, Algiers criminal court sentenced him to 5 years in prison for membership of a terrorist group. Released in 2002, Abderrahmane was arrested three more times by the police, who asked him to cooperate with them in exchange for a car and money; he refused and the police threatened him. Unable to bear the harassment any longer, he applied for a visa to go abroad. However, on 26 December 2006, he was arrested again, and his family

had no news of him for 12 days. During that period of detention, Abderrahmane was forced under torture to confess that he had had contact with armed terrorist groups. Members of his family who visited him on 14 June 1998 found him physically and psychologically marked by the torture: he had a wound to his head and was staring blankly. He told one of his sisters that, with a group of prisoners, he had been tortured and sexually abused by security agents who were visiting the prison. On 23 December 2008, he was sentenced to 4 years in prison and, at the time that the communication was submitted, he was being held in prison in Berrouaghuia.

Exhaustion of domestic remedies

2.9 Invoking several of the Committee's Views confirming its established jurisprudence, the author observes that only effective and available remedies need to be exhausted. She states that the family of the disappeared person pursued all possible remedies, administrative and judicial, to no avail.

2.10 Regarding the summary execution of her brother Atik on 15 July 1996, the author claims that no recourse is available, since the officer responsible for his death has admitted carrying out the killing, but has threatened the family with reprisals if they take any legal action. The fear of other relatives being tortured or killed has deterred the family from filing a complaint.

2.11 Similarly, Bedrane, who has been a victim of harassment, arbitrary detention and repeated torture, has not filed a complaint (nor has his family in this regard) against the authorities, since this would have irremediably exposed the family to reprisals and any complaints would then have had no chance of success.

2.12 In 1998, after they too had suffered torture and arbitrary detention, the author and her mother, represented by a lawyer, filed numerous appeals concerning the disappearance of Mohamed Mehalli. On 8 May 2000, the investigating judge of the Tribunal of Hussein Dey ordered that there were no grounds for prosecution; a second order of no grounds for prosecution was pronounced on 8 August 2000 by an investigating judge of another chamber of the same Tribunal. On 22 July 2000, the same court refused the author's request for a certificate attesting to the disappearance of her father, on the grounds that she did not have locus standi. On 7 February 2004, the author's mother filed a complaint with the court of the same Tribunal and, on 18 October 2004, the Tribunal finally recognized Mohamed Mehalli's disappearance; the Bachdjarah gendarmerie issued the certificate on 4 July 2006.

2.13 In respect of opening an investigation or a possible prosecution, the author argues that, in any event, no effective remedy is available within the meaning of article 2 of the Covenant in the present case, particularly in the light of the texts governing the application of the Charter for Peace and National Reconciliation, which prevent any legal recourse against officers of the State, thereby depriving victims of any effective remedy.

2.14 With regard to administrative remedies, the family filed a complaint with the *wilaya* of Algiers on 21 September 1998 (no action taken). They also contacted the National Human Rights Observatory on 14 July 1999. The National Advisory Commission for the Promotion and Protection of Human Rights, the successor to the Observatory, replied on 24 July 2002 that, according to the information obtained by the security forces, attempts to find the author's father had proved fruitless. Following a second letter sent to the Observatory on 7 September 1999, the family received a reply on 15 May 2000, saying that the author's father had never been sought or arrested by the security forces.

The complaint

3.1 The author alleges that the State party is guilty of a violation of articles 2 (para. 3), 7, 9 and 16 of the Covenant in respect of her father, Mohamed Mehalli, who has

disappeared. She asks that the members of Mohamed Mehalli's family should be compensated under article 2, paragraph 3, of the Covenant and that the authorities carry out an effective investigation.

3.2 The author also claims a violation of articles 6 and 2 (para. 3) of the Covenant in respect of her brother, Atik, who was killed; of articles 2 (para. 3) and 7 in respect of her mother, Fatma, the author herself and her sister, Soumia; of articles 7 and 9 in respect of her brother, Bedrane; and of articles 7, 10 and 2 (para. 3) in respect of her other brother, Abderrahmane.

State party's observations

4.1 On 6 October 2009, the State party contested the admissibility of the communication.[2] It submits that the communication incriminates public officials, or persons acting on behalf of public authorities, in relation to enforced disappearances that occurred during the period in question — from 1993 to 1998 — and should be considered in the broader context of the sociopolitical situation and declared inadmissible. The individual focus in this complaint does not reflect the national sociopolitical and security context in which the alleged events are said to have occurred, and does not reflect reality or the factual diversity of the situations covered by the generic term "enforced disappearance" during the period in question.

4.2 Contrary to the theories propounded by international NGOs, which the State party finds to be not very objective, the painful ordeal of terrorism that the State party experienced cannot be seen as a civil war between two opposing camps, but rather as a crisis that led to the spread of terrorism following calls for civil disobedience. This in turn led to the emergence of a multitude of armed groups engaged in terrorist crimes, acts of subversion, the destruction and sabotage of public infrastructure, and acts of terror targeting the civilian population. As a result, in the 1990s, the State party went through one of the most terrible ordeals of its young life as an independent country. In this context, and in accordance with the Constitution, precautionary measures were implemented, and the Algerian Government informed the Secretariat of the United Nations of its declaration of a state of emergency, in accordance with article 4, paragraph 3, of the Covenant.

4.3 During this period, terrorist attacks were a daily occurrence in the country; they were carried out by a host of ideologically driven armed groups with little in the way of hierarchy, which severely diminished the ability of the authorities to control the security situation. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. According to a variety of independent sources, including the press and human rights organizations, the concept of disappearances in Algeria during the period in question covers six possible scenarios, none of which can be blamed on the State: (a) persons reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and who instructed their families to report that they had been arrested by the security services as a way of "covering their tracks" and avoiding "harassment" by the police; (b) persons who were reported missing after their arrest by the security services but who took advantage of their subsequent release to go into hiding; (c) persons abducted by armed groups which, because they were not identified or had taken uniforms or identification documents from police officers or soldiers, were mistakenly identified as members of the armed forces or security

[2] In the same submission, the State party in fact contested the admissibility of eight other communications received.

services; (d) persons reported missing by their families but who had actually deliberately abandoned them and in some cases even left the country because of personal problems or family disputes; (e) persons reported missing by their families who were actually wanted terrorists who had been killed and buried in the maquis after factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups; and finally (f) persons reported missing who were in fact living in Algeria or abroad under false identities created via a vast network of document forgers.

4.4 The State party maintains that it was in view of the diversity and complexity of the situations covered by the concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of disappearances, taking account of all persons who had disappeared in the context of the "national tragedy", and under which all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 disappearances have been reported, 6,774 cases examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. In total, 371,459,390 Algerian dinars have been paid out as compensation to all the victims concerned and 1,320,824,683 dinars are paid in the form of monthly pensions.

4.5 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the relevant courts of justice. The State party notes that it may be seen from the author's statements that the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal proceedings and seen them through to their conclusion using all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to an investigating judge. In the Algerian system, it is the public prosecutor who receives complaints and who institutes criminal proceedings if these are warranted. Nevertheless, in order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes them to institute criminal proceedings by filing a complaint with the investigating judge. In that case, it is the victim, not the prosecutor, who institutes criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not used, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate an investigation, even if the prosecution service had decided otherwise.

4.6 The State party also notes the author's contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — makes it impossible to consider that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the author believed she was under no obligation to bring the matter before the relevant courts, in view of their likely position and findings regarding the application of the Ordinance. However, the author cannot invoke this Ordinance and its implementing legislation to absolve herself of responsibility for failing to institute the legal proceedings available to her. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility

of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.[3]

4.7 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, and its implementing ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices to mass killings, rapes or bombings in public places. This Ordinance also helps to address the issue of disappearances by introducing a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of the "national tragedy". Finally, the Ordinance prescribes political measures, such as a ban on engaging in political activity for any person who exploited religion in the past in a way that contributed to the "national tragedy", and establishes the inadmissibility of any proceedings, individual or joint, brought against members of any branch of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.8 In addition to the establishment of funds to compensate all victims of the "national tragedy", the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score-settling. The State party is therefore of the view that the author's allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.9 The State party asks the Committee to take into account the sociopolitical and security context at the time; to find that the author failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive national mechanism for processing and settling the cases referred to in these communications through a policy of peace and national reconciliation that is consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the author seek an alternative remedy.

4.10 In a further memorandum, the State party raises the question of whether the submission of a series of individual communications to the Committee might not actually be an abuse of procedure in respect of a broad historical issue whose causes and circumstances elude the Committee. These "individual" communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces and never mentioning those of the various armed groups that used criminal concealment techniques to incriminate the armed forces.

[3] The State party cites, inter alia, communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

4.11 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, and notes that all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. The decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections relating to the Committee's procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that therefore these questions could be considered separately. It maintains that none of the complaints or requests for information made by the authors of the communications were submitted through channels that would have allowed consideration of the case by the Algerian judicial authorities and notes that only a few of the communications reached the level of the Indictments Chamber (court with jurisdiction to hear appeals).

4.12 Recalling the Committee's jurisprudence regarding the obligation to exhaust domestic remedies, the State party maintains that mere doubts about the prospect of success or worries about delays do not exempt an author from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has ruled out the possibility of any remedy in this area, the State party replies that the failure of the author to take any steps to submit her allegations to scrutiny has prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the Ordinance in question, the only proceedings that are inadmissible are those brought against "members of the defence and security forces of the Republic" for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place in any other context are subject to investigation by the appropriate courts.

4.13 On 24 January 2011, the State party reiterated its previous comments in extenso.

Author's comments on the State party's submission

5.1 On 30 August 2012, the author submitted comments on the State party's observations. She points out that the State party contests the admissibility of the communication for non-exhaustion of domestic remedies, given, inter alia, that no legal proceedings had been instituted and followed through, in appeal or judicial review. Referring to the Committee's jurisprudence, the author notes that only available and effective remedies must be exhausted, and that the local remedies rule does not apply to appeals that objectively have no prospect of success. She notes that the Committee has found that the useful nature of a remedy assumes that the State party has an obligation to conduct a thorough investigation into the alleged crimes on the merits, but that this requirement has not been met in this case. She then recalls all the administrative and judicial procedures undertaken by the family to find out what had happened to the victim, including two complaints to the Prosecutor of the Tribunal of Hussein Dey filed by a lawyer in the year following the disappearance, which led to an order stating that there were no grounds for prosecution. In respect of the summary execution of her brother Atik and the arbitrary detention and torture of her brothers Bedrane and Abderrahmane, she notes that, according to the Committee's jurisprudence, a victim is not required to use remedies that are likely to cause him or her harm. She reiterates that the harassment and threats suffered by the family have deterred them from initiating judicial proceedings.

5.2 The author adds that, in the present case, there was no need to compensate for any lack of action by a prosecutor by making use of articles 72 and 73 of the Code of Criminal Procedure, given that, despite their fears, the family did petition the prosecutor who, in turn, initiated the procedure leading to the judicial orders of 8 May and 8 August 2000. In 2000 as well, the family took steps to obtain a declaration of disappearance of the author's father, which was produced only in October 2004, with no mention of the circumstances of the disappearance. Subsequently, in application of the Charter for Peace and National Reconciliation, a certificate of disappearance of the author's father was drawn up on 4 July 2006, but the document does not specify the circumstances of the disappearance, despite the family's testimony to the police investigation department; the family was never involved in any investigation.

5.3 The author invokes the Committee's Views in communication No. 1588/2007, *Benaziza v. Algeria*,[4] and notes that, in the present case, the competent authorities should not have ignored the enforced disappearance of Mohamed Mehalli and should have conducted a thorough investigation into the alleged facts, searched for the perpetrators and initiated proceedings. In the light of the description of the family and the information given about the alleged perpetrators, the public prosecutor could, under article 170 of the Code of Criminal Procedure, have appealed against the investigating judge's decision that there were no grounds for prosecution. According to the author, this all shows that the family did not have access to effective or useful remedies to oblige the authorities to proceed with a thorough and rigorous investigation. The subsequent entry into force of Ordinance No. 06-01 of 27 February 2006 meant that remedies were no longer available to families of the disappeared, since its article 45 makes it impossible to bring any proceedings against the defence or security forces.

5.4 The author claims that the three situations described in article 45 of Ordinance No. 06-01 are formulated so broadly as to encompass all circumstances in which State officials have engaged in serious acts of violence against persons, such as disappearances, extrajudicial killings and even torture. Thus, in stating that complaints against members of the military or security forces will automatically be deemed inadmissible, article 45 precludes any possibility of a complaint being declared admissible by the prosecution service.

5.5 Many of the families of disappeared persons who have lodged complaints through the courts against a person or persons unknown or who have requested an investigation into the fate of a disappeared person have been directed to the *wilaya* commission charged with implementing the Charter for Peace and National Reconciliation in order to carry out the necessary steps to obtain compensation. The author maintains that, since 2006, the application of the Charter for Peace and National Reconciliation and the compensation procedure has been the only response of the authorities to all the demands for the truth addressed by the families to the relevant judicial and administrative bodies. She also points out that the Committee has declared article 45 of the Ordinance not to be in conformity with the Covenant, called for it to be amended and requested the State party to take all appropriate measures to guarantee that serious violations of human rights, such as torture and disappearances, are investigated and that the perpetrators of such violations, including State officials and members of armed groups, are prosecuted.[5]

[4] Communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010.

[5] Concluding observations of the Human Rights Committee concerning the third periodic report of Algeria, CCPR/C/DZA/CO/3, adopted on 1 November 2007, paras. 7 (a) and (b).

Issues and proceedings before the Committee

Consideration of admissibility

6.1 The Committee first recalls that the decision to examine the admissibility and the merits jointly (see paragraph 1.2 of the present Views) does not preclude their being considered separately by the Committee. The joinder of cases does not mean they must be examined simultaneously. Therefore, before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that, in the State party's view, the author has not exhausted domestic remedies, since she did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. Furthermore, according to the State party, the author has written letters to political and administrative authorities but has not actually initiated legal action and seen it through to its conclusion by using all available remedies of appeal and judicial review. The Committee also notes the steps taken by the author and her family, including legal action, in the hope of finding the disappeared person and notes the author's argument that those steps have been limited by a real fear of reprisals. The Committee furthermore notes that, since the promulgation on 27 February 2006 of Ordinance No. 06-01 governing the application of the Charter for Peace and National Reconciliation, the family no longer has the legal right to initiate judicial proceedings.

6.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights brought to the attention of its authorities, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations.[6] Mohamed Mehalli's family contacted the police, administrative and political authorities repeatedly about his disappearance, but the State party failed to conduct a thorough and rigorous investigation. The State party has also failed to provide sufficient information indicating that an effective remedy is available, since Ordinance No. 06-01 of 27 February 2006 continues to be applied, notwithstanding the Committee's recommendations that it should be brought into line with the Covenant.[7] The Committee considers that, for the purposes of admissibility of a communication, the authors must have exhausted only the remedies effective against the alleged violation, in the present case, remedies effective against enforced disappearance. The Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.[8] Moreover, given the vague wording of articles 45 and 46 of the Ordinance and, in the absence of satisfactory information from the State party about their interpretation and actual enforcement, the author's fears in respect of the effectiveness of filing a complaint are reasonable. In light of all these considerations, the Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an

[6] See, for example, communication No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 22 March 2013, para. 7.4.

[7] CCPR/C/DZA/CO/3, paras. 7, 8 and 13.

[8] See, for example, *Boudjemai v. Algeria*, para. 7.4.

obstacle to the admissibility of the communication in the part related to the disappearance of Mohamed Mehalli.

6.5 The Committee also notes the other allegations made by the author concerning the fate of her brother Atik[9] and the ill-treatment and torture suffered by her brothers Bedrane and Abderrahmane,[10] as well as the detention of the author's mother, the author herself and her sister Soumia for 8 days in Chateauneuf barracks, and the way in which the latter two were treated. The Committee notes that the State party has presented a general argument against the admissibility of these allegations for non-exhaustion of domestic remedies. It also notes the author's explanation that the harassment and threats suffered by the family deterred them from complaining or taking any judicial action. In the absence of any clear indication by the State party of the remedies that the presumed victims should have exhausted, without any explanation of their effectiveness and availability in the general context of the present case, and in the absence of any other information relevant to the case, the Committee considers that due weight must be given to the author's allegations. It therefore declares this part of the communication admissible.

6.6 The Committee accordingly finds that the author has sufficiently substantiated her claims insofar as they raise issues under articles 7, 9, 16 and 2 (para. 3) of the Covenant in respect of the disappearance of Mohamed Mehalli. The Committee also considers that the allegations under articles 7, 9 and 10 of the Covenant concerning the treatment of other members of the family, and under article 6 of the Covenant concerning the author's deceased brother, Atik, have been sufficiently substantiated. The Committee therefore proceeds to consider the communication on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 In the present communication, the State party simply maintains that communications incriminating public officials, or persons acting on behalf of public authorities, in relation to enforced disappearances that occurred during the period in question — from 1993 to 1998 — should be considered in the broader context of the sociopolitical situation and security conditions that prevailed in the country at a time when the Government was struggling to fight terrorism. The Committee observes that the Covenant demands that the State party concern itself with the fate of every individual and treat every individual with respect for the inherent dignity of the human person. The Committee wishes to recall its jurisprudence[11] to the effect that the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant.[12]

[9] See paragraph 2.10 of the present Views.

[10] See paragraphs 2.2 and 2.8 of the present Views.

[11] See, inter alia, communications No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11; No. 1588/2007, *Benaziza v. Algeria*, para. 9.2; No. 1781/2008, *Berzig v. Algeria*, para. 8.2; and No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 7.2.

[12] CCPR/C/DZA/CO/3, para. 7.

7.3 The Committee notes that the State party has not replied to the author's claims concerning the merits of the case, and recalls its jurisprudence,[13] according to which the burden of proof should not rest solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often only the State party is in possession of the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it.[14] In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

7.4 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment,[15] in which it recommends that States parties should make provision against incommunicado detention. It notes that, in the case in question, Mohamed Mehalli was arrested by the authorities on 29 June 1998, that he has had no contact with his family since then and that, according to his family, he was tortured in Chateauneuf military barracks shortly after his arrest. In the absence of any explanation from the State party in respect of this allegation, the Committee considers that these events constitute a violation of article 7 of the Covenant with regard to Mohamed Mehalli.[16]

7.5 The Committee also takes note of the anguish and distress caused to the author by Mohamed Mehalli's disappearance, as well as acts of harassment and ill-treatment of various members of her family. In the absence of any response from the State party on this issue, the Committee considers that the facts before it disclose a violation of article 7 of the Covenant in their respect.

7.6 In respect of the author's claims under article 9 of the Covenant that the authorities have never acknowledged her father's arrest and detention, even though the author saw him when he was detained in Chateauneuf military barracks in 1998: in the absence of any relevant information from the State party, the Committee concludes that the facts before it disclose a violation of the rights of Mohamed Mehalli under article 9 of the Covenant.

7.7 The Committee further notes that the author also invokes a violation of her father's rights under article 16 of the Covenant. It reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded.[17] In the present case, the Committee notes that the State party has not provided information on the fate or whereabouts of the disappeared person, despite the author's many requests to the State party. The Committee concludes that Mohamed Mehalli's enforced disappearance since 29

[13] See, for example, communication No. 1863/2009, *Maharjan v. Nepal*, Views adopted on 19 July 2012, para. 8.3.

[14] *Maharjan v. Nepal*, para. 8.3.

[15] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40*, (A/47/40), annex VI, sect. A.

[16] *Maharjan v. Népal*, para. 8.5.

[17] See, for example, communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.9.

June 1998 placed him outside the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

7.8 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose rights under the Covenant have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant,[18] which provides, inter alia, that a failure by a State party to investigate allegations of violations could, in and of itself, give rise to a separate breach of the Covenant. In the present case, the author and her family contacted the competent authorities regarding Mohamed Mehalli's disappearance as soon as he was arrested. However, all their efforts were to no avail and the State party failed to conduct a thorough and rigorous investigation into his disappearance. Furthermore, the absence, since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, of the legal right to initiate judicial proceedings continues to deprive Mohamed Mehalli, the author and her family of access to any effective remedy, since the Ordinance prohibits, on pain of imprisonment, the initiation of legal proceedings to shed light on the most serious crimes, such as enforced disappearances.[19] In the light of the above, the Committee concludes that the facts before it disclose a violation of article 2 (para. 3), read in conjunction with articles 7, 9 and 16 of the Covenant with regard to Mohamed Mehalli, and of article 2 (para. 3), read in conjunction with article 7 of the Covenant, with regard to the author, her mother and her brothers and sisters.

7.9 The Committee then notes the author's complaint relating to the murder of her brother Atik by the police. It notes that the State party has not put forward any argument to refute the complaint. In the absence of any other relevant information, the Committee considers that that due weight must be given to the author's allegations. Accordingly, it concludes that the facts as submitted disclose the responsibility of the State party in the death of the author's brother, Atik, who was arbitrarily deprived of his life, and therefore concludes a violation of his rights under article 6, paragraph 1, of the Covenant.

7.10 In respect of the illegal detention, ill-treatment and torture suffered by the author's brothers, Bedrane and Abderahmane, the eight-day detention in Chateauneuf barracks of her mother, the author herself and her sister, Soumia, and the way in which the latter two were treated and humiliated there, and particularly the sexual abuse, a form of extreme gender-based violence, suffered by Soumia, the Committee notes that the State party has not provided any specific comments to refute these allegations. In these circumstances, the Committee considers that due weight must be given to the author's detailed allegations. Accordingly, it concludes that this part of the communication discloses a violation of the rights of the author's brothers, Bedrane and Abderrahmane, of the author's own rights and of the rights of her sisters and her mother, under articles 7 and 9 of the Covenant.

7.11 In the light of the foregoing, the Committee decides not to examine separately the author's complaints under article 10 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of articles 7, 9 and 16, and of article 2 (para. 3) read in conjunction with articles 7, 9 and 16 of the Covenant with regard to Mohamed Mehalli, and of articles 7 and 9 and article 2 (para. 3), read in conjunction

[18] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, (A/59/40 (vol. I)), annex III.

[19] CCPR/C/DZA/CO/3, para. 7.

with articles 7 and 9 of the Covenant, with regard to the author, her mother and her brothers, Bedrane and Abderrahmane, and her sisters; and of article 2 (para. 3) read in conjunction with article 6 (para.1) with regard to her deceased brother, Atik.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including by: (a) conducting a thorough and effective investigation into the disappearance of Mohamed Mehalli; (b) providing the author with detailed information about the results of its investigation; (c) releasing Mohamed Mehalli immediately if he is still being detained incommunicado; (d) in the event that Mohamed Mehalli is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; (f) providing adequate compensation to the author and her family for the violations suffered, and to Mohamed Mehalli, if he is still alive; (g) carrying out a prompt and effective investigation into the allegations of torture of the author, her sisters and her brothers, Bedrane and Abderrahmane, prosecuting and punishing the perpetrators, and providing the victims with adequate compensation, including for their illegal detention in this context; and (h) carrying out a prompt and effective investigation into the exact circumstances of the death of the author's brother, Atik, with a view to the prosecution and punishment of those responsible. Notwithstanding the terms of Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information concerning the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian, as part of the Committee's annual report to the General Assembly.]

Appendix

Joint opinion of Mr. Fabián Omar Salvioli and Mr. Víctor Rodríguez Rescia

1. We share the opinion of the Committee and the conclusions that it has reached in *Mehalli v. Algeria* (communication No. 1900/2009). As we have stated on several previous occasions in similar cases,[a] we consider that, in the present instance, the Committee should have indicated that, by adopting Ordinance No. 06/01, certain provisions of which — in particular article 46 — are clearly incompatible with the Covenant, the State has failed to comply with the general obligation set forth in article 2, paragraph 2, of the Covenant. The Committee should also have found a violation of article 2, paragraph 2, read in conjunction with other substantive provisions of the Covenant. With regard to redress, we consider that the Committee should have recommended that the State bring Ordinance No. 06/01 into line with the Covenant.

2. Moreover, in the present case, the Committee should have found a violation of article 6 of the Covenant, given that the State has failed in its duty to guarantee the right to life. Had the Committee reached that conclusion, its position would have been consistent with its jurisprudence in previous cases — some involving the same State party — which involve facts and events that are identical in nature to those of the *Mehalli* case.[b] Furthermore, during the same session at which the present conclusions were adopted, in a similar case of enforced disappearance, the Committee reached a different conclusion even though the proven facts were the same.[c]

3. We have repeatedly maintained that, when faced with proven facts in a case file, the Committee's application of the Covenant should not be limited by the parties' legal arguments. Thus, the Committee has acted correctly on various occasions,[d] although on others, such as the *Mehalli* case, the Committee has decided to restrict the scope of its deliberations without providing valid reasons for doing so.

4. For reasons set out previously in similar cases, to which we refer the reader in order to avoid repeating them here, we consider that, in the present case, given the State party's adoption of Ordinance No. 06/01, the Committee should also have found a violation of article 2, paragraph 2 read in conjunction with other substantive provisions of the

[a] See, for example, our joint opinion in *Mihoubi v. Algeria*, communication No. 1874/2009.

[b] See, for example, communications No. 1781/2008 and No. 1798/2008, *Lemmiz v. Algeria*, Views adopted on 25 July 2013.

[c] See communication No. 1889/2009, *Marouf v. Algeria*, Views adopted on 21 March 2014 (paras. 7.4 and 8).

[d] Simply by way of example, see: communication No. 1390/2005, *Koreba v. Belarus*, Views adopted on 25 October 2010; communication No. 1225/2003, *Eshonov v. Uzbekistan*, Views adopted on 22 July 2010, para. 8.3; communication No. 1206/2003, *R.M. and S.I. v. Uzbekistan*, Views adopted on 10 March 2010, paras. 6.3 and 9.2, with a finding of no violation; communication No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010; communication No. 1320/2004, *Pimentel et al. v. Philippines*, Views adopted on 19 March 2007, paras. 3 and 8.3; communication No. 1177/2003, *Ilombe and Shandwe v. Democratic Republic of the Congo*, Views adopted on 17 March 2006, paras. 5.5, 6.5, and 9; communication No. 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para. 3.7; and communication No. 1044/2000, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 3.

Covenant.[e] Consequently, in the paragraph on redress, the Committee should have recommended that the State party bring Ordinance No. 06/01 into line with the Covenant.

5. This would be consistent with the Committee's own reasoning in the present case, in which it states that: "Ordinance No. 06/01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant."[f] After such a categorical statement, it is incomprehensible that the Committee has failed to indicate that, in order to redress the violation, the Ordinance should be amended to bring it into line with the Covenant.

6. Lastly, we wish to express our satisfaction that the Committee, for the first time in its history when dealing with an individual communication, has stated that the treatment of a woman who was raped (a sister of the petitioner) constitutes an form of extreme gender-based violence.[g]

7. This sort of analysis, based on a gender perspective, represents a step forward in the exercise of the jurisdiction of a body such as the Committee. It should have led to the establishment of adequate redress in the form of education and training for law enforcement officials on gender issues and women's rights in order to ensure the non-recurrence of such events.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

---

[e] See our joint opinion in the *Mihoubi v. Algeria* case.
[f] See paragraph 7.2, in fine, of the present Views.
[g] See paragraph 7.10 of the present Views.